

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

CASE NO. C12-1207 MJP

Plaintiff,

ORDER ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

V.

MATTHEW J. LOEWEN, 0803065 B.C.
Ltd., 0881046 B.C. Ltd., ReadyPay
Services, Inc., and Xavier Processing
Services, LLC,

Defendants.

This matter comes before the Court on Plaintiff's motion for summary judgment (Dkt. No. 56), to which the pro se Defendants have not responded. Having reviewed the motion and its exhibits, including those volumes previously entered in support of Plaintiff's Motion for a Temporary Restraining Order (Dkt. No. 40-1–40-5), Defendants' Declarations in support of their Response to the Motion for a Temporary Restraining Order (Dkt. Nos. 28–30), and all related filings, the Court GRANTS Plaintiff's motion and hereby ORDERS that summary judgment is entered in favor of Plaintiff.

Background

2 Plaintiff Federal Trade Commission (FTC) brings this action against Defendants Matthew
3 J. Loewen and his companies 0803065 B.C. Ltd., 0881046 B.C. Ltd., ReadyPay Services, Inc.,
4 and Xavier Processing Services, LLC, alleging violations of Section 5 of the FTC Act, 15 U.S.C.
5 § 45, and the Telemarketing Sales Rule, 16 C.F.R. Pt. 310. According to the FTC, Loewen used
6 these companies to operate a telemarketing scheme that defrauded the sellers of vehicles on
7 Craigslist.org and similar websites in three principal ways, each of which allegedly gives rise to
8 liability under both the FTC Act and the Telemarketing Sales Rule. (Pl's Mot. Summ. Judg. at
9 14–17, Dkt. No. 57 at 21–24.) The FTC alleges first, that Loewen's telemarketers (doing
10 business as such entities as Auto Marketing Group and Vehicle Stars) contacted the Craigslist
11 sellers and fraudulently offered to match them with specific buyers; second, that the
12 telemarketers falsely represented that a sale would be accomplished within a short period of
13 time; and third, that they sold refund guarantees for an additional fee, but that due to undisclosed
14 conditions, those refunds were nearly impossible to redeem. (Id.) With regard to each defendant,
15 the FTC alleges that Defendants ReadyPay Services, Inc., and Xavier Processing Services, LLC,
16 provided substantial assistance to Loewen's telemarketers in violation of the Telemarketing
17 Sales Rule; the Loewen is personally liable; and that all Defendants operated as a common
18 enterprise.

19 The FTC previously brought two motions for temporary restraining orders (Dkt. Nos. 3,
20 8), which this Court denied because at the time there was insufficient evidence in the record to
21 demonstrate that Loewen's activities continued past the purported sale of his telemarketing
22 business in November 2011. (Dkt. No. 7; Dkt. No. 39 at 4–5, 6.) The FTC also brought a motion
23 for sanctions against Defendants based on their failure to participate fully in discovery (Dkt. No.

1 53), which this Court granted. (Dkt. No. 55.) The FTC now moves for summary judgment or, in
 2 the alternative, to strike Defendant's answer and enter defaults against each Defendant for failure
 3 to comply with this Court's sanctions order. (Dkt. No. 56; Dkt. No. 57.) Loewen is now
 4 proceeding pro se, and has not responded to Plaintiff's motion for summary judgment.

5 **Facts**

6 I. The Telemarketing Scheme

7 In part because Defendants declined to fully participate in discovery (see Pl's Second
 8 Mot. for Sanctions, Dkt. No. 57 at 2, 3 n.1), the FTC relies on the declarations of individuals
 9 who were contacted by Loewen's telemarketing entities to establish the outline of the pitch. (See
 10 Pl's Vol. I, Ex. 1–11, Dkt. No. 40-2 at 3–140.) In the initial pitch, Loewen's telemarketers
 11 contacted people who were attempting to sell used vehicles on Craigslist.org or similar websites.
 12 (Dkt. No. 40-2 at 3; id. at 28; id. at 33; id. at 55; id. at 64; id. at 72; id. at 82; id. at 93; id. at
 13 103; id. at 123; id. at 135.) After informing the seller that the caller represented one of Loewen's
 14 various D/B/As (see Dkt. No. 40-2 at 3; id. at 28; id. at 33; id. at 55; id. at 64; id. at 72;
 15 id. at 82; id. at 93; id. at 103; id. at 123; id. at 135), the caller in most cases explained that one or
 16 two buyers had been located for the exact vehicle the seller had put up for sale, and that in
 17 exchange for a fee of around \$399, the caller would put the buyer or buyers in touch with the
 18 seller. (Dkt. No. 40-2 at 3; id. at 28; id. at 55–57; id. at 64; id. at 72; id. at 93; id. at 103; id. at
 19 123; id. at 135; see also id. at 33–34 [caller represented that there were several buyers in the area
 20 looking for that sort of vehicle and that he was confident Vehicle Stars could sell it]; id. at 82
 21 [caller represented that there was great demand for that type of vehicle in the area and that she
 22 was sure it would sell quickly].) The caller frequently stated that the company provided
 23 financing for buyers with poor credit histories—a fact that, if true, would have explained the
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1 company's access to purchasers who were not in a position to respond directly to the seller's
 2 online ad. (See Dkt. No. 40-2 at 3; id. at 28; id. at 33–34; id. at 72; id. at 82; id. at 93.)
 3 Representing the transaction as nearly risk-free, the telemarketer told the seller that the \$399 fee
 4 would become a refundable deposit with the purchase of additional insurance for \$99. (Dkt. No.
 5 40-2 at 29; id. at 33–34; id. at 56; id. at 64–65; id. at 72; id. at 83; id. at 93–94; id. at 103–04; id.
 6 at 123; id. at 135; see also id. at 3-4 [base price characterized as refundable deposit and only at
 7 the verification stage did the caller mention the \$99 insurance].)

8 According to representations that Loewen's companies made to credit card companies
 9 and regulators prior to this lawsuit and that Loewen submitted to this Court in the case's early
 10 stages, a formal proposal email was sent to prospective clients at the time of the initial pitch and
 11 before their credit card was charged. (See Dkt. No. 40-2 at 17–18; Declaration of Walter Kean,
 12 Dkt. No. 30-1 at 8–9; id. at 21; id. at 23–25.) However, the record does not show that clients
 13 regularly received such emails prior to credit card confirmation or that the emails listed any of
 14 the otherwise undisclosed eligibility requirements that were attached to the guarantee. (Compare,
 15 e.g., Dkt. No. 40-2 at 17–18 [purported proposal email provided by Auto Marketing Group to
 16 credit card company after the charge was disputed, listing two requirements for post-
 17 confirmation registration by the seller but no other refund eligibility requirements] with id. at 38
 18 [different email received by declarant prior to credit card confirmation, giving no indication of
 19 either registration requirements or refund eligibility requirements]; and id. at 5 [no email
 20 received prior to credit card confirmation].)

21 Those who accepted Loewen's deal soon discovered that neither buyers for their vehicles
 22 nor refunds from the telemarketer were forthcoming. (See Dkt. No. 56 at 11–13.) The record
 23 lacks any evidence that Loewen's companies engaged in providing financing for credit-
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1 challenged buyers of vehicles, as the telemarketers had suggested. Indeed, Loewen's manager
2 previously represented to this Court that the verification script used by the telemarketers
3 included a standard admission that there was no buyer for the vehicle and that the seller was
4 instead entering into a contract to place advertisements for the vehicle online (Dkt. No. 30 at
5 9)—a revealing if not particularly persuasive assertion, since all the sellers had already
6 demonstrated their ability to place online ads on their own.

7 After charging the sellers' credit cards, Loewen's companies sent follow-up emails listing
8 additional steps for "registering to be eligible for the money back guarantee," such as uploading
9 digital photographs of the vehicle, that had not been previously disclosed. (See Dkt. No. 40-2 at
10 5; id. at 9; id. at 24–25; id. at 35; id. at 40; id. at 65; id. at 68; id. at 83–84; id. at 87; id. at 94; id.
11 at 98; id. at 110.) The list of hurdles for securing a refund after the vehicle inevitably failed to
12 sell through the company was even longer, and included such onerous and previously
13 undisclosed requirements as having proof of continued ownership of the vehicle notarized and
14 submitted via certified mail within the 7-day period following the end of the 90-day refund
15 period. (Dkt. 30-1 at 14; but see also Dkt. No. 40-2 at 72 [declarant stating that the telemarketer
16 had specified that refund request had to be notarized].) Unsurprisingly, few sellers were able to
17 clear the hurdles, and even those who diligently fulfilled the requirements were frequently denied
18 refunds by Loewen's companies. (Dkt. No. 40-2 at 6–7; id. at 31–32; id. at 35–36; id. at 73–75;
19 id. at 79; id. at 105–06; id. at 137–38; id. at 125; see also id. at 58–59 [seller obtained chargeback
20 from credit card company]; id. at 96 [same]; id. at 66–67 [seller obtained partial refund after
21 intercession by the Better Business Bureau]; id. at 84–86 [seller obtained refund only after
22 placing hundreds of calls to the company].) The only service Loewen's companies may have
23 performed on occasion for their clients was to post advertisements for vehicles on the company
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1 website (see, e.g., Dkt. No 40-2 at 30)—the same service that the clients had performed for
 2 themselves on other websites prior to engaging Loewen.

3 Loewen’s companies generated a high number of “chargebacks” from credit card
 4 companies, indicating that many of his clients were so dissatisfied with the services provided that
 5 they successfully disputed the charges with their credit card company rather than or in addition
 6 to seeking a refund. (See Pl’s Vol. II, Ex. 13, Attach. 12, Dkt. No. 40-4 at 35–46 [MasterCard
 7 records indicating chargeback rates for Auto Marketing Group that increased until the account
 8 was eventually terminated for violating the excessive chargeback program].) After one of
 9 Loewen’s merchant accounts, Defendant ReadyPay Services, was terminated and he himself was
 10 placed on MATCH, an industry blacklist (Loewen Dep., Dkt. No. 56-2 at 181–82; Dkt. 40-4 at
 11 47), Loewen engaged his friend Erica Siegred to open a merchant account in her own name and
 12 process payments for the telemarketing operation in exchange for two percent of the gross
 13 receipts. (Siegred Dep., Pl’s Vol. IV, Ex. Dkt. No. 56-2 at 12 [email from Siegred to Loewen
 14 indicating the terms of the arrangement and expressing trepidation about being “black listed”].)
 15 Siegred received the chargeback notifications from the credit card payment processor, but
 16 immediately forwarded them to Loewen. (Siegred Dep., Pl’s Vol. IV, Ex. 16, Dkt. No. 56-1 at 9,
 17 15.) From Siegred’s perspective, Loewen remained in charge of in the same telemarketing
 18 operation beyond November 2011, when Loewen claims the operation was sold to another entity,
 19 even as it transitioned to a new D/B/A. (Dkt. No. 56-1 at 34, 96.)

20 II. Roles of the Defendants

21 Loewen’s telemarketing experience began in 2006 when his Nevada corporation,
 22 Defendant ReadyPay Services, Inc. (see Dkt. No. 56-2 at 28:14–25), started to provide credit
 23 card payment processing for a preexisting telemarketing business operated by Warren Kean.

1 (Dkt. No. 56-2 at 23:19–25:7.) In 2007 Loewen opened a merchant account for Kean at payment
 2 processor Orion Payment Systems in the name of ReadyPay, using a D/B/A (“Boy [sic] Great
 3 Auto”) very similar to the D/B/A then used by Kean (“Buy Great Autos”). (Pl’s Vol. II, Ex. 13,
 4 Attach. 11, Dkt. 40-4 at 24–25; Dkt. No. 56-2 at 96:4–13, 115–16; Pl’s Vol. III, Ex. 14, Dkt. No.
 5 40-5 at 4–5.) As Loewen conceded at his deposition, opening a merchant account in a name other
 6 than that of the actual merchant is not typical in the credit card processing industry; the practice
 7 is resorted to when the merchant is unable to open an account in its own name. (Dkt. No. 56-2 at
 8 88:3–6; 90:16–21.)

9 During the period Loewen was providing payment processing to Kean, he further assisted
 10 the operation by regularly changing the D/B/As for the ReadyPay merchant account. (Dkt. No.
 11 40-5 at 30.) This rotation of names helped to ensure that clients would not encounter “bad
 12 publicity on the Internet” for the D/B/A currently in operation. (Dkt. No. 56-2 at 143:14–
 13 144:13.) In February 2010, Loewen obtained a personal stake in the telemarketing operation and
 14 became a co-owner along with Kean. (Dkt. No. 28 at 4–5; Dkt. No. 30 at 3; Dkt. No. 56-2 at 149;
 15 Dkt. No. 56-3 at 37.) By November 2010, Loewen was referring to himself as the CEO of Auto
 16 Marketing Group. (Dkt. No. 56-2 at 149; Dkt. No. 56-4 at 2.) He was in charge of processing
 17 chargebacks for the various D/B/As. (Dkt. No. 56-1 at 9, 15.) Loewen’s participation in the
 18 telemarketing operation also extended to knowledge of certain refund procedures (Dkt. No. 56-2
 19 at 12) and the fact that the telemarketers ceased calling California and British Columbia
 20 telephone numbers so that employees would not be bothered by local “disgruntled consumer[s]”
 21 (id. at 108:12–24; id. at 12).

22 Furthermore, since this Court’s denial of the temporary restraining order, the FTC has
 23 submitted additional evidence showing that Loewen’s participation in the telemarketing scheme
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1 did not cease in November 2011, when he purportedly sold the operation to Marbls Marketing.
 2 (See Dkt. No. 28 at 2.) At Loewen's direction, Erica Siegred opened a merchant account for a
 3 new D/B/A at the time of the purported sale. (See Dkt. No. 56-1 at 34, 96.) Well after the
 4 purported sale, Loewen was invoicing Marbls Marketing for a monthly "management fee," an
 5 "administrative fee," and IT support. (Dkt. No. 56-1 at 52:18–54:4, 109–10.) At her deposition,
 6 Siegred stated that she continued working as a payment processor for Loewen personally through
 7 the time of the purported sale, that the transition to the new D/B/A was "seamless," and that her
 8 duties to Loewen did not change as a result of the transition. (Dkt. No. 56-1 at 47:16–48:19.)

9 In addition to ReadyPay Services, Inc., the FTC has also named as defendants Xavier
 10 Processing Services, LLC; 0803065 B.C. Ltd.; and 0881046 B.C. Ltd.—all entities controlled by
 11 Loewen. The companies' responsibilities were thoroughly "intermingle[d]" and even Loewen
 12 had difficulty in his deposition recalling which employees formally worked for which
 13 companies. (See Dkt. No. 56-2 at 34:12–13; 36:12–25.) Loewen ran the operation out of the
 14 same locations (Dkt. No. 56-2 at 69:12–71:8), and the companies shared the same administrative
 15 staff. (See Dkt. No. 56-2 at 33:21–25; 59:9–17; 80:13–20.) Generally, however, Xavier
 16 Processing Services, LLC, was used to open a Florida post office box that was used in
 17 conjunction with one of Loewen's D/B/As (see Dkt. No. 56-2 at 58–62); 0803065 was used to
 18 process payments from Canadian customers, receive funds from American customers, and pay
 19 salaries for the operation's employees, including its telemarketers (see Dkt. No. 56-2 at 66–67,
 20 75–78; Dkt. No. 56-1 at 40–42, 62–63, 64–65, 107–08, 115–16, 117–25); and 0881046 was used
 21 to hold the licenses required for telemarketing in Canada (see Dkt. No. 56-2 at 82–84).

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Discussion

The Court considers Plaintiff's Motion for Summary Judgment first, in light of the public policy favoring the disposition of cases on their merits. See Dreith v. Nu Image, Inc., 648 F.3d 779, 788 (9th Cir. 2012).

I. Summary Judgment Standard

6 A party is entitled to summary judgment of its claims when “there is no genuine dispute
7 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
8 56(a). As the moving party, the FTC bears the initial burden of demonstrating the absence of a
9 genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256
10 (1986). Once the FTC meets its initial burden, “the burden shifts to [Defendants] to set forth, by
11 affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue
12 for trial.” FTC v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009). Defendants wishing to assert
13 that there is a genuine issue of material fact “must support the assertion by (A) citing to
14 particular parts of materials in the record . . . ; or (B) showing that the materials cited do not
15 establish the absence . . . of a genuine dispute, or that [Plaintiff] cannot produce admissible
16 evidence to support the fact.” Fed. R. Civ. P. 56(c)(1). If Defendants fail to address the FTC’s
17 assertion of facts as required by Rule 56, the Court may “consider the fact undisputed for the
18 purpose of the motion.” Fed. R. Civ. P. 56(e). The rule “prohibits the grant of summary judgment
19 ‘by default even if there is a complete failure to respond to the motion.’” Heinemann v.
20 Satterberg, No. 12-35404, 2013 WL 5312568, at *3 (9th Cir. Sept. 24, 2013) (quoting Fed. R.
21 Civ. P. Advisory Notes (2010)). And in considering the motion, the Court must view all the
22 evidence in the light most favorable to Defendants. See SEC v. Platforms Wireless Int’l Corp.,
23 617 F.3d 1072, 1085 (9th Cir. 2010). Nonetheless, the Court may “grant summary judgment if

1 the motion and supporting materials—including the undisputed facts—show that the movant is
 2 entitled to it.” Fed. R. Civ. P. 56(e).

3 II. Liability Under the FTC Act and the Telemarketing Sales Rule

4 Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting
 5 commerce.” 15 U.S.C. § 45(a)(1). In order to establish Defendants’ liability under Section 5(a),
 6 the FTC must demonstrate “(1) that there was a representation; (2) that the representation was
 7 likely to mislead consumers acting reasonably under the circumstances; and (3) that the
 8 representation was material.” Stefanchik, 559 F.3d at 928 (quoting FTC v. Gill, 265 F.3d 944,
 9 950 (9th Cir. 2001)). Here, the FTC alleges that three representations in Defendants’
 10 telemarketing pitch were both misleading and material:

- 11 1) Defendants had found a buyer for the consumer’s vehicle, and Defendants would put
 the consumer in contact with the buyer for a fee, typically \$399.00. (Dkt. No. 56 at
 21.)
- 14 2) Because of the high demand for the consumer’s vehicle at the price the consumer was
 offering, a consumer who used Defendants’ service was highly likely to sell her
 vehicle in a short period of time. (Id.)
- 17 3) If the consumer purchased a refund insurance policy for an additional \$99, then
 Defendants would refund the \$399 initial fee if Defendants failed to secure a buyer
 for the vehicle within 90 days. (Id. at 22.)

20 Since most consumer declarants heard both Statements 1 and 3, and all those that did not hear
 21 Statement 1 did hear Statement 3 (see Dkt. No. 40-2 at 33–34; id. at 82), the Court will focus its
 22 analysis on those two statements.

1 Both statements are specific and clearly “material” as the term is used in the FTC Act.
 2 FTC v. Cyberspace.com, LLC, 453 F.3d 1196, 1201 (9th Cir. 2006) (defining “material” as
 3 “involv[ing] information that is important to consumers and, hence, likely to affect their choice
 4 of, or conduct regarding, a product”). Both the promise of a buyer and a money-back guarantee
 5 should the buyer fall through are features that would be likely to lure consumers attempting to
 6 sell vehicles. Indeed, though the FTC need not prove actual reliance by consumers on the
 7 statements, FTC v. Figgie Int’l, Inc., 994 F.2d 595, 605–06 (9th Cir. 1993), the consumer
 8 declarations here are full of examples of such reliance.

9 Both statements are also misleading. With regard to Statement 1, the telemarketers had
 10 not, in fact, located buyers for the vehicles, and if any service was provided in exchange for the
 11 \$399 fee, it was the far less valuable service of advertising the vehicle on the website of the
 12 D/B/A in operation at the time. The promise to match buyer with seller was simply false. As for
 13 Statement 3, statements can also be misleading under the FTC Act if the overall “net impression”
 14 they create is deceptive. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009). Although some
 15 exceedingly persistent consumers may have obtained refunds from Loewen’s companies (see
 16 Dkt. No. 40-2 at 84–86 [refund obtained after hundreds of calls]; Dkt. No. 56-1 at 111 [email to
 17 Siegred with subject line “BBB refunds” listing “immediate refunds with the Customer
 18 Names”]), the net impression of an easily obtainable refund was decidedly deceptive.

19 The conclusion that these statements are deceptive is further supported by the high
 20 chargeback rates Loewen’s companies experienced and the need to resort to multiple D/B/As as
 21 a means of evading poor publicity and thwarting credit-card excessive-chargeback policies. See
 22 FTC v. Grant Connect, LLC, 827 F. Supp. 2d 1199, 1221 (D. Nev. 2011) (citing “high
 23 cancellation, refund, and chargeback rates” as evidence of deceptive practices); FTC v. J.K.
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1 Publications, Inc., 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000) (citing fictitious business names
 2 as a key fact helping to demonstrate defendants' unfair business practices in violation of the FTC
 3 Act). The FTC has thus demonstrated that no genuine issue of material fact exists with respect to
 4 Defendant's liability under the FTC Act.

5 Similarly, no genuine issue exists with respect to Defendants' liability under the
 6 Telemarketing Sales Rule (TSR). The TSR prohibits telemarketers from, among other acts,
 7 “[m]aking a false or misleading statement to induce any person to pay for goods or services.” 16
 8 C.F.R. § 310.3(a)(4). Statements 1 and 3 were at minimum misleading, as described above, and
 9 were made in order to persuade customers to pay hundreds of dollars to Loewen's companies.
 10 Similarly, Defendants' promise to match buyers with sellers violated the provision of the TSR
 11 prohibiting material misrepresentations regarding the “nature[] or central characteristics” of the
 12 service, 16 C.F.R. § 310.3(a)(2)(iii), and Defendants' representations about the refund insurance
 13 program violated the provision of the TSR prohibiting material representations regarding the
 14 terms of the seller's refund policies. 16 C.F.R. § 310.3(a)(2)(iv).

15 III. Liability of Each Defendant

16 The 9th Circuit test for individual liability for injunctive and monetary relief depends in
 17 part on a determination of corporate liability. See Stefanchik, 559 F.3d at 931. Here, the lines
 18 between the four corporate defendants, which were all controlled solely by Loewen and shared
 19 employees and funds, were blurred to the point where they can only be considered a common
 20 enterprise. See FTC v. Network Servs. Depot, Inc., 617 F.3d 1127, 1142–43 (9th Cir. 2010)
 21 (finding a common enterprise where corporate defendants pooled resources, staff, and funds,
 22 were controlled by the same individuals, and participated in the same deceptive acts). Each can
 23 therefore be held liable for the deceptive practices of the others.

1 Individual liability then turns on whether the Loewen “had knowledge that the
 2 corporation or one of its agents engaged in dishonest or fraudulent conduct, that the
 3 misrepresentations were the type upon which a reasonable and prudent person would rely, and
 4 that consumer injury resulted,” Network Servs. Depot, Inc., 617 F.3d at 1138, and whether he
 5 “participated directly in the deceptive acts or had the authority to control them.” Stefanchik, 559
 6 F.3d at 931 (emphasis in original). An awareness of a high probability of fraud along with an
 7 intentional avoidance of the truth suffices to establish “knowledge.” Network Servs. Depot, Inc.,
 8 617 F.3d at 1138.

9 In previous stages of the case, Loewen’s primary defense as to “knowledge” was his
 10 alleged lack of involvement in the day-to-day operations of the telemarketing business. (See Dkt.
 11 No. 28 at 3.) According to Loewen, he was a “passive owner” who “seldom” visited the office
 12 where the telemarketers worked. (Id.) Assuming this claim is true, the Court is nevertheless
 13 satisfied that Loewen’s awareness of a high probability of fraud has been established by
 14 uncontested evidence that Loewen changed D/B/As to avoid bad publicity (Dkt. No. 40-5 at
 15 30), that Siegred forwarded to Loewen all the chargeback notices for processing (Dkt. No. 56-1
 16 at 9, 15), that Loewen was aware of certain exceptional refund procedures (Dkt. No. 56-2 at 12),
 17 and that he was aware that the telemarketers ceased calling California and British Columbia
 18 telephone numbers so that employees would not be bothered by local “disgruntled consumer[s]”
 19 (id. at 108:12–24; id. at 12), among other facts.

20 Loewen also had authority to control the deceptive acts. Due to his position as officer in
 21 each of the companies, including the company that was responsible for paying telemarketer
 22 salaries (Dkt. No. 56-2 at 75–78), Loewen had authority to control his companies’ telemarketing
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1 practices even if he did not exercise it. He can thus be held personally liable for both injunctive
2 and monetary relief.

IV. Relief

4 The FTC seeks both permanent injunctive relief and equitable monetary relief in the
5 amount of consumer losses, as measured by all adjusted net credit card sales (net sales less net
6 chargebacks) by Lowen's and Siegred's merchant accounts for the telemarketing operation from
7 March 2010 through the present. The Court is authorized to grant such relief by 15 U.S.C. §
8 53(b) ("in proper cases the Commission may seek, and after proper proof, the court may issue, a
9 permanent injunction") and 15 U.S.C. § 57b(b) (monetary relief). There is no genuine issue of
10 material fact as to the amount of consumer losses caused by Defendants' deceptive acts. (See
11 Dkt. No. 56-2 at 150; Dkt. No. 56-3 at 32–34.) A permanent injunction restraining conduct must
12 be tailored to the specific harm alleged, Lamb-Weston, Inc. v. McCain Foods, Ltd., 941 F.2d
13 970, 974 (9th Cir. 1991), though the Supreme Court has advised those who violate the FTC Act
14 to expect some degree of fencing in. FTC v. National Lead Co., 352 U.S. 419, 430 (1957). The
15 FTC's requested injunctive relief—a ban on all telemarketing and payment processing—is
16 directed at the activities which gave rise to Defendants' liability, and does not prohibit
17 Defendants from engaging in business ventures other than telemarketing and payment
18 processing. Cf. J.K. Publications, 99 F. Supp. 2d at 1209–10. The relief requested by the FTC is
19 warranted to prevent Defendants from continuing to engage in the heretofore lucrative deception
20 they have been practicing.

Conclusion

22 Plaintiff's motion for summary judgment is GRANTED. The Court grants Plaintiff's
23 requested relief in the form presented by the FTC in its proposed order (Dkt. No. 56-7),

1 including a permanent injunction enjoining Defendants from violating the provisions of the FTC
2 Act and the TSR and from engaging in telemarketing and payment processing, and monetary
3 relief totaling \$5,109,366.62. The Court adopts and incorporates the FTC's proposed order as
4 part of this ruling. Because the Court grants summary judgment in favor of Plaintiff, the Court
5 declines to consider Plaintiff's motion in the alternative to strike Defendants' answer and enter
6 default.

7 The clerk is ordered to provide copies of this order to Defendants and all counsel.

8 Dated this 29th day of October, 2013.

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Marsha J. Pechman
Chief United States District Judge